

REDACTED FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application of Cellco Partnership d/b/a)	WT Docket No. 12-4
Verizon Wireless and SpectrumCo LLC)	
For Consent To Assign Licenses)	
)	
Application of Cellco Partnership d/b/a)	
Verizon Wireless and Cox TMI Wireless, LLC)	
For Consent To Assign Licenses)	

**HAWAIIAN TELCOM COMMUNICATIONS, INC. PETITION TO DENY OR
CONDITION ASSIGNMENT OF LICENSES**

February 21, 2012

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**HAWAIIAN TELCOM COMMUNICATIONS, INC. PETITION TO DENY OR
CONDITION ASSIGNMENT OF LICENSES**

Hawaiian Telcom Communications, Inc. (“HTCI”), by its undersigned counsel, hereby petitions the Commission to deny or, in the alternative, condition the above-captioned applications for consent to assign certain wireless spectrum licenses, pursuant to 47 USC §§ 309(d) and 310(d), and the Commission’s rules.

I. EXECUTIVE SUMMARY

HTCI contends that Verizon Wireless’ acquisition of Hawaii wireless licenses from SpectrumCo and the related joint marketing and research and development agreements between Verizon Wireless and Oceanic Time Warner Cable will harm the market for voice, high-speed Internet (wireless and wireline) and paid video programming services in Hawaii as well as harm HTCI, which, through its wholly owned subsidiaries, Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., competes directly in the provision of those services. HTCI and its wholly owned subsidiaries are collectively referred to herein as “Hawaiian Telcom.” Specifically, the transaction and agreements will enhance Oceanic’s already dominant market position and will facilitate coordinated action between Verizon Wireless and Oceanic that will harm competition in various markets. Hawaiian Telcom is further concerned that because the details of the joint marketing and research and development agreements remain hidden from

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Hawaiian Telcom, other members of the public, and the Commission, these agreements may enable Verizon Wireless and SpectrumCo to engage in conduct that is not in the public interest. Accordingly, Hawaiian Telcom requests that the Commission draw negative inferences regarding the redacted language when assessing whether Verizon Wireless and SpectrumCo met their burden of demonstrating that the transaction and related agreements are in the public interest.

As more fully explained below, Hawaiian Telcom requests that the Commission (1) deny assignment of the wireless licenses from SpectrumCo to Verizon Wireless, (2) in the alternative, deny assignment of the wireless licenses from SpectrumCo to Verizon Wireless in Hawaii, (3) or, as a less desirable alternative, condition the transferring of the wireless licenses from SpectrumCo to Verizon Wireless in Hawaii on the modification of the Verizon Wireless and Oceanic joint marketing agreements such that Hawaii is the last location where those agreements would be implemented.

II. STATEMENT OF FACTS AND BACKGROUND

A. The Applications

In the Applications, Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) and SpectrumCo¹ request consent to assign 122 Advanced Wireless Services (AWS-1) licenses to Verizon Wireless from SpectrumCo; and Verizon Wireless and Cox² seek Commission consent

¹ SpectrumCo is a joint venture among subsidiaries of Comcast Corp. (“Comcast”), Time Warner Cable Inc. (“Time Warner Cable”), and Bright House Networks, LLC (“Bright House”). SpectrumCo is owned by Comcast (63.6 percent), Time Warner Cable (31.2 percent), and Bright House (5.3 percent). *See* Verizon Wireless-SpectrumCo Application, File No. 0004993617, Description of Transaction and Public Interest Statement at 2 (“*SpectrumCo Public Interest Statement*”).

² Cox TMI Wireless, LLC is a subsidiary of Cox Communications, Inc., which Cox states is the third largest cable company in the country, and a long-time provider of high-speed Internet and local telephone services. *See* Verizon Wireless-Cox Application, File No. 0004996680, Public Interest Statement at 2. (“*Cox Public Interest Statement*”). At the time SpectrumCo was granted the AWS-1 licenses that are the subject of the Verizon Wireless-SpectrumCo Application, an affiliate of Cox Communications, Inc. (“Cox Communications”) held a 10.441%

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to assign 30 more AWS-1 licenses to Verizon Wireless from Cox (the “Transactions”). These licenses were not being used by SpectrumCo or Cox (together, the “Assignors”) to provide any services, but had been lying fallow since they were granted in 2006.³

In addition to the spectrum transfers, Verizon Wireless has entered into marketing arrangements with SpectrumCo principals Comcast, Time Warner Cable,⁴ and Bright House, and separately with Cox, that reportedly include agreements under which these companies and Verizon Wireless will sell each other’s cable and wireless services and engage in joint research and development (the “Joint Agreements”). Applicants claim that the Joint Agreements have no bearing on whether the spectrum sale is in the public interest and do not require Commission approval but, at the Commission’s request, Applicants have submitted the agreements into the record as “Highly Confidential” materials. Even though these materials are subject to a highly restrictive Protective Order, the copies submitted into the record were heavily redacted.⁵

B. Hawaiian Telcom

Hawaiian Telcom is the incumbent local exchange carrier that operates throughout the State of Hawaii. Hawaiian Telcom’s telecommunications network services approximately 421,000 switched access lines, 216,000 long distance lines, and 101,000 high-speed Internet connections. Hawaiian Telcom competes head-to-head with Oceanic Time Warner Cable (“Oceanic”) in the provision of voice, broadband, and video services in Hawaii.

equity interest in SpectrumCo. *See* Application of SpectrumCo LLC, ULS File No. 0002774487, filed October 4, 2006, and *Cox Public Interest Statement* at 3. In 2009, the Cox Communications affiliate exited the SpectrumCo venture, receiving as part of its redemption value the AWS-1 licenses that are the subject of the Verizon Wireless-Cox Application. *Id.*

³ *SpectrumCo Public Interest Statement* at 1-3; *Cox Public Interest Statement* at 1-3. Because the legal and policy arguments asserted by Applicants with respect to both Transactions are substantially similar, hereafter we will cite only the *SpectrumCo Public Interest Statement*.

⁴ Oceanic Time Warner Cable, the incumbent cable programming provider in Hawaii, is a wholly owned subsidiary of Time Warner Cable Inc.

⁵ *See* Letter of Media Access Project *et al.* to Marlene H. Dortch, FCC, Secretary, WT Docket No. 12-4 (Feb. 7, 2012).

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Providing communications services in Hawaii is extremely challenging given the state's unique geography, geology, topography and population characteristics. For example, Hawaii is the only state where deep-sea submarine fiber and microwave links are essential to provide both intrastate and interstate transport. Microwave solutions have limited bandwidth and distance limitations, and are affected by atmospheric conditions. Undersea fiber optic cables have to deal with strong ocean currents, violent storms, tsunamis, volcanic activity and seaquakes. Additionally, coastal infrastructure must withstand corrosive salt exposure, lava flows, and hurricanes. Those conditions and the dramatic variations in topography across even short distances, makes telecommunications infrastructure deployment especially difficult in the sparsely populated areas of the state outside of Honolulu.⁶

Hawaiian Telcom's market share in the wired high-speed Internet service market for consumers is [Highly Confidential] [REDACTED] [Highly Confidential]. By contrast, Hawaiian Telcom has only recently started the phased launch of its paid TV service in July 2011. Following the approach of other telecom providers, the availability of Hawaiian Telcom's TV service is being expanded in a measured way to neighborhoods on the island of Oahu – the only island on which Hawaiian Telcom has secured a video service franchise.

Hawaiian Telcom's video service is still in its infancy and is attempting to gain a foothold in the Hawaii market against Oceanic's monopolistic share. At this point, Hawaiian Telcom TV currently has less than [Highly Confidential] [REDACTED] [Highly Confidential] share of the paid video services market in Hawaii. Given the unique construction and logistical difficulties associated with communications infrastructure deployment in Hawaii, the impact of any actions

⁶ The island of Oahu, which comprises approximately 9 percent of Hawaii's land mass, houses about 70 percent of its population, with the vast majority located in a single city, Honolulu. The remaining islands comprise approximately 91 percent of Hawaii's land mass, but house only about 30 percent of its population. Outside of Honolulu, therefore, the state's population density is generally extremely low. The same is true with respect to geographic loop density, with only three of Hawaiian Telcom's wire centers, all located in Honolulu, having line density greater than 10,000 loops per square mile.

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that could hinder Hawaiian Telcom's ability to compete is greatly magnified and could stifle competition more dramatically than in other locations throughout the United States.

C. Competitive Landscape in Hawaii

At this time, the market for paid video services in the state of Hawaii has been dominated by Oceanic for decades with 93% of consumer households on the island of Oahu today (89% of households across the state of Hawaii) subscribing to Oceanic's video service. In contrast to their significant presence in the continental U.S., DISH Network and DirecTV do not provide a competitive presence in Hawaii, with only about 5% of the market. This stems from the technical problems created by the fact that Hawaii is at the edge of the satellite transponder footprint for those services. Antennas must be pointed at a relatively low angle to the horizon and, therefore, signals can be hindered easily because of physical or topographical reasons (not to mention an increase in signal disruptions resulting from rain attenuation). As noted above, Hawaiian Telcom has only recently begun providing a competitive TV service to Oceanic and only has [Highly Confidential] [REDACTED] [Highly Confidential] market penetration. Competitive forces in the video market in Hawaii are clearly not constraining Oceanic's pricing power. Oceanic recently raised monthly rates for its Standard service Primary Outlet service by 9%, from \$54.80 to \$59.80, effective March 1, 2012, and raised rates for some other services by an even larger percentage.⁷

Broadcast television is a particularly poor alternative to paid television in Hawaii given the large number of households without line-of-sight and near-line-of-sight to television broadcasting towers because of mountain ridges and valley walls. As a result, broadcast television, even though free, is not an adequate substitute for paid video in Hawaii.

With respect to the provision of high-speed Internet access services, Oceanic again is the dominant provider in Hawaii and has a share of [Highly Confidential] [REDACTED] [Highly Confidential]

⁷ See Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, FCC, Secretary, CSR-8563-E (Feb. 17, 2012).

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of the market for wired high-speed Internet service for consumers. As noted above, Hawaiian Telcom is essentially the only other wired high-speed Internet access service provider in Hawaii and has [Highly Confidential] [REDACTED] [Highly Confidential] of that market.

Verizon Wireless has a national wireless market share of 32.3%⁸ and accounts for 45% of wireless industry EBITDA.⁹ Verizon Wireless has deployed 4G LTE services in Hawaii and is advertising its mobile broadband services as having average downlink data rates of 5 to 12 Mbps¹⁰ -- sufficiently fast to enable stutter-free video content delivery. Data also indicates that more people are using wireless broadband for high-speed Internet access services and video programming content delivery. A recent study conducted by the Pew Research Center showed that 25% of smartphone owners did most of their online activities on their smartphone.¹¹ Additionally, nearly a third of those smartphone owners did not have broadband access at home.¹² Clearly, the percentage of people obtaining their broadband Internet access using smart phones and other wireless devices, such as iPads and other tablets, is growing rapidly.

As the FCC has previously defined “broadband service” as Internet access speeds in excess of 200 Kbps and is considering raising that level to 768 Kbps for 4G LTE service,¹³

⁸ Wireless Telecommunications Carriers in the US, IBISWorld Industry Report 51332, p.30 (Sept. 2011)

⁹ *Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, WT Docket No. 11-65, ¶ 37 (2011)(“Staff Analysis and Findings”).

¹⁰ *4G Smartphones, Modems And Hotspots Arrive On The Verizon Wireless Network On Oahu, Hawaii, On July 21*, <http://news.verizonwireless.com/news/2011/07/pr2011-07-18a.html> (July 7, 2011).

¹¹ Smith, Aaron, *35% of American adults own a smartphone*, Pew Internet & American Life Project, p. 14 (July 11, 2011)(“Pew Internet & American Life Project”).

¹² *Pew Internet & American Life Project*, p. 14. Note that this statistic does not include electronic tablet owners that use wireless 4G LTE services to access the Internet. The addition of those users would presumably increase the overall number of people who use their tablet as the principal mechanism to access the Internet and who also do not have broadband access at home.

¹³ *See generally, Internet Access Services: Status as of December 31, 2010*, Industry Analysis and Technology Division, Wireline Competition Bureau (October 2011)(FCC considers

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Hawaiian Telcom contends that, nevertheless, Verizon Wireless' 4G LTE service (which provides speeds far exceeding these standards) is, for some significant segment of high-speed Internet access consumers, a demand substitute for Hawaiian Telcom's and Oceanic's wired broadband services and, therefore, should be treated as part of the same relevant market of high-speed Internet access services. In this market, the transaction is horizontal in nature, with the dominant player (Oceanic) teaming up with what is believed to be the third largest, and rapidly growing, player, Verizon Wireless.

Hawaiian Telcom further notes that the current technology trend is for higher and higher wireless Internet access speeds. There is also a clear trend towards use of tablet devices that are served by wireless providers, such as Verizon Wireless. The trend towards tablets reduces the significance of the fact that a computer has a significantly larger screen than a wireless handset. While tablet screens are typically smaller than computer screens, the difference in screen size is not nearly as pronounced. As these trends continue, any meaningful difference between wired and wireless Internet access for the majority of customers will diminish. Given that the agreements pertinent to the Commission's review in this matter are for [Highly Confidential] [REDACTED] [Highly Confidential] Hawaiian Telcom urges the FCC to consider the impact of those agreements over at least that period of time, especially since [Highly Confidential] [REDACTED] [Highly Confidential]. Failing to do so will discount the long-term anticompetitive effects Hawaiian Telcom contends will result from the agreements. As reflected in the Commission's recent *Staff Analysis and Findings* on the proposed AT&T-Mobile transaction, the Commission views such transactions in accord with antitrust principles that it is not necessary to prove that the transaction "has caused higher prices in the affected

"broadband service" as Internet access speeds in excess of 200 Kbps). *Connect American Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, ¶ 1036 (2011) (FCC considering increase in definition of broadband line to 256 Kbps or even 768 Kbps for 4G LTE service).

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market. All that is necessary is that mergers create an appreciable danger of such consequences in the future.”¹⁴

III. LEGAL STANDARD AND PUBLIC INTEREST FRAMEWORK

When deciding whether to grant a license assignment, the Commission must conclude, pursuant to Section 310(d) of the Communications Act, whether “the Applicants have demonstrated that the proposed transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity.”¹⁵ Accordingly, the Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.”¹⁶

The Commission’s public interest analysis also “necessarily encompasses the ‘broad aims of the Communications Act.’”¹⁷ As the Commission explained in its recent *AT&T-Qualcomm* decision, these broad aims include, among other things, “a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.”¹⁸

The Commission has also recognized that a proposed transaction may have both beneficial and harmful effects. For example, “combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in

¹⁴ *Staff Analysis and Findings*, at ¶ 16 (citing *United States v. H&R Block*, slip op. at 14 (quoting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986))).

¹⁵ *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 11-18, FCC 11-118, ¶ 23 (2011) (citing 47 U.S.C. § 310(d)) (“*AT&T-Qualcomm Order*”).

¹⁶ *AT&T-Qualcomm Order*, at ¶ 23.

¹⁷ *AT&T-Qualcomm Order*, at ¶ 24 (emphasis in original).

¹⁸ *AT&T-Qualcomm Order*, at ¶ 24.

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anticompetitive ways.”¹⁹ To preserve the benefits, the Commission is authorized “to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction.”²⁰ Specifically, section 303(r) of the Act authorizes the Commission “to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act.”²¹ In exercising this broad authority, the Commission generally has “imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission’s responsibilities under the Act and related statutes.”²²

The Applicants contend that the joint marketing and research and development agreements they have entered into (a) have no bearing on whether the spectrum sale is in the public interest, (b) do not require Commission approval, and (c) need not be part of the formal record in this proceeding.²³ While Hawaiian Telcom does not take a position on whether the agreements require Commission approval, Hawaiian Telcom wholly disagrees with the Applicants’ position that the agreements do not relate to the spectrum sale or that they do not need to be considered in this proceeding.

As noted previously, the FCC is charged with determining whether the Applicants have carried their burden to demonstrate that the proposed assignment of licenses will serve the public interest, convenience, and necessity. Also as noted previously, the Commission’s public interest evaluation is broad in nature and that it reviews, among other things, the competitive effects of a

¹⁹ *Applications for Consent to Transfer of Control of Licenses XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12366, at ¶ 33 (2008)(“Sirius-XM Order”).

²⁰ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4249, at ¶ 25 (2011)(“Comcast-NBCU Order”).

²¹ *Comcast-NBCU Order*, at ¶ 25.

²² *Id.*; *Sirius-XM Order*, at ¶ 33

²³ Letter from Michael H. Hammer, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, p.2 (Jan. 18, 2012).

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proposed transaction.²⁴ In fact, “the Commission review of the competitive effects of a transaction under the public interest standard is broader [than the competitive review conducted by DOJ].”²⁵ Accordingly, the Commission has a great deal of latitude as to what it may examine in order to effectuate its charge.

Furthermore, the Applicants acknowledge that they already have provided those agreements in an unredacted state to the DOJ as part of its review.²⁶ Nevertheless, the Applicants maintain that the joint marketing and research and development agreements are not relevant for the Commission’s review.

The Applicants’ position is nonsensical. If DOJ is examining the agreements for its own competition review, then the Commission should also be permitted to examine those same agreements for its competition review under the broader public interest analysis. At a minimum, DOJ’s decision to request and examine the agreements should have sufficient gravitas for the Commission to conclude that the agreements relate in some measure to the spectrum assignment transaction. Accordingly, the Commission should reject the Applicants’ claim that the Commission should not review the joint marketing and research and development agreements when conducting its public interest determination.

IV. THE JOINT MARKETING AND JOINT RESEARCH AND DEVELOPMENT AGREEMENTS ARE NOT IN THE PUBLIC INTEREST

A. Joint Marketing and Joint Research and Development Agreements

The joint marketing and joint research and development agreements (the “Joint Agreements”) entered into between Verizon Wireless and the SpectrumCo cable companies and Cox Communications have been redacted to the point of uselessness. With so many of the

²⁴ *AT&T-Qualcomm Order*, at ¶¶ 24-25.

²⁵ *AT&T-Qualcomm Order*, at ¶ 25.

²⁶ Letter from Applicants’ Counsel to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, p.3 (Feb. 9, 2012).

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contractual details undisclosed, it is impossible to determine the extent to which the parties can engage in potentially anticompetitive practices. It is further impossible to determine if the terms and conditions of the Joint Agreements are on their face anticompetitive.

Hawaiian Telcom is not the only party to complain about the scope of the material redacted by the Applicants from the Joint Agreements provided at the request of the FCC Staff to the Commission.²⁷ Free Press, along with several other public interest organizations, noted that “[b]y withholding all information about pricing and compensation ... the parties have denied the Commission and interested parties the opportunity to assess the economic incentives created by these agreements and their potential effects on competition in the relevant markets.”²⁸ As neither the Commission nor interested parties have an adequate basis upon which to assess the public interest implications of the proposed transactions, Free Press requested, among other things, that the Commission should direct the Applicants to produce complete and unredacted versions of the agreements, subject to the Protective Orders.

In response, the Applicants objected to Free Press’ request and repeated their contention that the Joint Agreements were not relevant to the license assignment applications as those agreements do not required Commission approval.²⁹ Nevertheless, the Applicants noted that they had previously submitted those agreements under the Highly Confidential classification, with “particularly commercially-sensitive provisions” redacted.³⁰ According to the Applicants, the redacted material was “limited” and related to “pricing, compensation, and marketing strategies.”³¹ The Applicants further noted should the Commission remain concerned about the content of the Joint Agreements, Commission staff could conduct an *in camera* review of that

²⁷ Letter of Media Access Project *et al.* to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 12-4 (Feb. 7, 2012).

²⁸ *Id.* at p. 2.

²⁹ Letter of Applicants to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 12-4 (Feb. 9, 2012).

³⁰ *Id.* at p.2.

³¹ *Id.*

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material at the Department of Justice's offices, as the Applicants had provided unredacted versions to the DOJ and have agreed to allow Commission staff to conduct such a review.³²

Hawaiian Telcom does not contest the Applicants' Highly Confidential designation but strongly objects to the Applicants' refusal to provide the complete Joint Agreements for the record in this proceeding. As more fully detailed below, Hawaiian Telcom contends that the joint marketing and joint research and development agreements injure competition and are particularly harmful to Hawaiian Telcom. For example, Applicants have redacted pricing, compensation, and marketing strategy information from the documents provided to the Commission, information that goes to the core of Hawaiian Telcom's concerns regarding the reduction in the incentive for the parties to compete and potentially anticompetitive marketing practices. By refusing to provide the Commission, the industry, and the interested public with such important information, the Applicants deny the Commission the full benefit of its process to conduct a public interest evaluation.

Furthermore, allowing Commission staff to review the agreements at the DOJ does not address this problem. In both scenarios, the Commission is deprived of the insight, experience, and judgment that can be provided on behalf of industry representatives and interested members of the public as Hawaiian Telcom and everyone else remain unable to provide constructive commentary. The Commission has called for public comment on the Application, rather than relying on solely its Staff's review of the Application, for good reason: public comment is likely to assist the Staff and the Commission in arriving at an informed decision in the public interest. Depriving the public of the ability to review and comment on critically important portions of the proposed transaction deprives the Commission of the benefit of public comment on these provisions. Accordingly, the Commission should insist on the complete production of the Joint Agreements, subject to the protections accorded to Highly Confidential documents. The

³²

Id. at p.3.

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Commission should not base its decision on documentation that is available only to Applicants and Commission Staff.

Should the Applicants continue, however, to insist that they will not produce the redacted material even under a Highly Confidential designation, Hawaiian Telcom asserts that the Commission must reject the Applicants' claims that the information is not relevant and instead resort to drawing negative inferences regarding the redacted material. "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its [tenor is unfavorable to the party's cause]."³³ This is a practice that has been endorsed and employed by both the United States Court of Appeals for the District of Columbia Circuit and the Commission itself.³⁴ As Hawaiian Telcom is denied the ability to examine for itself the Applicants' claims of non-relevance even under the restrictive terms of a "Highly Confidential" designation, Hawaiian Telcom requests that the Commission conclude that the Applicants are hiding the information so as to prevent Hawaiian Telcom and others from discovering and drawing to the attention of the Commission its anticompetitive effects.

³³ *Int'l Union, United Auto., Aerospace and Agricultural Implement Workers of America v. Nat'l Labor Relations Bd.*, 459 F.2d 1329, 1349 (D.C. Cir. 1972) (citing 2 J. Wigmore, Evidence § 285, p. 162 (3rd ed. 1940)).

³⁴ See, e.g., *Int'l Union, United Auto., Aerospace and Agricultural Implement Workers of America v. Nat'l Labor Relations Bd.*, 459 F.2d 1329, 1349 (D.C. Cir. 1972); *In re Applications of Port Huron Family Radio, Inc., L&K Broadcasting, Inc. for Construction Permit for a New FM Station*, 4 FCC Rcd. 2532 (1989) (Party seeking construction permit made unsubstantiated claims with respect to recollections of conversations with a landowner's agent. Review Board noted the absence of corroboration from the agent, stating that: "It is fundamental that: The failure to bring before the tribunal some circumstance, document, or witness, when wither that party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." (citing 2 Wigmore on Evidence §285 (1940))); *In Re Application of Blue Ridge Mountain Broadcasting Co.*, 26 F.C.C.1348, 1349-50 (1964) (where party testified that he had a "draft copy" of a program schedule where a longhand draft would have been a much more substantial document and stated that he did not know where it was or what happened to it, the Commission noted that the failure to produce said draft justifies the presumption that if the party's penciled draft of the program schedule had been produced, it would have been unfavorable).

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Accordingly, the Commission should draw the negative inference that whatever material is redacted by the Applicants discloses that the transaction and the Joint Agreements are not in the public interest.

B. Competitive Concerns

The Joint Agreements between Verizon Wireless and Oceanic combine the marketing, sales, and product development of the nation's largest wireless service provider that also provides a wireless broadband service with the dominant provider of high-speed Internet access and multichannel video programming distribution service in Hawaii. While all the details are not available, what is known is that Verizon Wireless will offer for sale [Highly Confidential] [REDACTED] [Highly Confidential] currently competing high-speed Internet access services of its previous rival for these services, Oceanic, as well as Oceanic's wireline and video services.

As noted previously, the unique conditions in Hawaii present significant challenges to Hawaiian Telcom's ability to deploy the facilities necessary to compete against Oceanic. These difficulties magnify the impact of any anticompetitive actions engaged in by the Applicants. The effect of Verizon Wireless being able to market Oceanic's service and Oceanic being able to market Verizon Wireless' services is, therefore, greater in Hawaii than it might be in another region of the U.S. Given that Hawaiian Telcom's market penetration in the paid video market is sufficiently small at this point, any effort that curtails its growth will mean that there will be fewer competitive forces in the market place to restrain any anticompetitive conduct (*e.g.*, increase prices or reduce output) engaged in by Oceanic and/or Verizon Wireless.

Additionally, Applicants do not contend that the combination of the Verizon Wireless and Oceanic sale forces in Hawaii generates any pro-competitive efficiencies. Nor is there an economic justification for such an arrangement, based on the information available to Hawaiian Telcom. In fact, given the redacted portions of the Applicants' Joint Agreements, Hawaiian Telcom can only presume that the announced marketing arrangements are anticompetitive and will harm both competition and Hawaiian Telcom directly. Accordingly, the Applicants cannot

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affirmatively assert that their joint marketing arrangements provide evidence of benefits that are in the public interest in support of the transaction.

As the provider of 4G LTE wireless services in Hawaii, Verizon Wireless provides a broadband service that competes with Hawaiian Telcom's and Oceanic's Internet access services.³⁵ As publicly disclosed, the agreements between Verizon Wireless and Oceanic allow for Verizon Wireless to market Oceanic's high-speed Internet service in Hawaii. Because Verizon Wireless will be receiving payment for selling Oceanic's high-speed Internet service, it will have less incentive to compete aggressively through its own 4G LTE service. Since the amount that Verizon Wireless earns by selling this service has been concealed by Applicants, it is reasonable for the Commission and Hawaiian Telcom to infer that Verizon Wireless will earn at least as much profit selling Oceanic's service as it earns by selling its own service. It is certainly possible that Verizon Wireless, in fact, may profit more from selling Oceanic's high-speed Internet service than it does from selling its own high-speed Internet service. In either situation, Verizon Wireless has a reduced incentive to compete against Oceanic's high-speed Internet access service. Accordingly, under such a scenario, the agency relationship created by the agreements between Verizon Wireless and Oceanic harms competition in the broadband Internet access services market.

With respect to the video market, the potentially anticompetitive effects of the joint market agreements are similar. Under those agreements, as publicly disclosed, Verizon Wireless will be able to sell Oceanic's video services along with Oceanic's high-speed Internet access service. Verizon Wireless does not sell Hawaiian Telcom's services, in fact, the TWC Agent Agreement [Highly Confidential] [REDACTED]

³⁵ AT&T, Sprint, and T-Mobile do not provide 4G LTE services in Hawaii.

³⁶ TWC Agent Agreement, [Highly Confidential] [REDACTED]. [Highly Confidential]

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[Highly Confidential] Given that Oceanic's market share for paid video services exceeds 90%, any further increase in market concentration raises significant competitive concerns and warrants antitrust scrutiny.³⁷

Furthermore, the combination of Oceanic's sales force with Verizon Wireless' harms competition in the provision of video services. Hawaiian Telcom is just beginning to offer a video service in competition with Oceanic. By combining the marketing sales forces and advertising dollars of Oceanic and Verizon Wireless, the proposed transaction will hamper Hawaiian Telcom's ability to compete against Oceanic in this market, without any pro-competitive efficiency rationale provided by the Applicants for the combination. The disparity in the relative market shares exacerbates the anticompetitive effect of the combination. Accordingly, the proposed transaction and accompanying agreements raise significant competitive concerns that the Commission must address.

The Commission should also recognize that Verizon Wireless also competes against Hawaiian Telcom and Oceanic in the provision of video services and that the joint marketing agreements between Verizon Wireless and Oceanic combine the offerings of direct competitors, and not providers of separate service as the Applicants want the Commission to believe. At virtually the same time as Hawaiian Telcom was rolling out its video programming service, Verizon Wireless launched its 4G LTE offering in Hawaii in July 2011.³⁸ Verizon Wireless specifically advertises that its 4G LTE service allows its customers to stream movies with no buffering³⁹ and is "aggressively expanding [its] 4G LTE network to cover [its] entire nationwide

³⁷ *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, § 5.3, p. 19 (Aug. 19, 2010).

³⁸ *Verizon Wireless Launches 4G LTE in Honolulu, Hawaii, on July 21*, <http://news.verizonwireless.com/news/2011/06/pr2011-06-21v.html> (June 21, 2011).

³⁹ <http://www.verizonwireless.com/b2c/explore/?page=why-verizon§ion=verizon-4g-lte#verizon-4g-lte> (last accessed Feb. 16, 2012).

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3G footprint by the end of 2013.”⁴⁰ Wireless mobile 4G services increasing are a substitute for other means of video programming delivery. Programming is increasingly offered at websites viewable over high-speed Internet access services, *e.g.*, Hulu, MLB.tv, Netflix, Amazon, NFL.com. The competitive impact of the joint market agreement is that it greatly increases the possibility that Verizon Wireless and Oceanic will engage in coordinated, anticompetitive conduct in the Hawaii video market.

Competition is also undermined in the wireless market. In exchange for spectrum and in effect an implied promise not to compete with Verizon Wireless in the mobile voice and broadband markets, Oceanic and the other cable participants receive through a joint marketing agreement the ability to offer Verizon Wireless’ wireless service. Given that key terms of the joint marketing agreements remain hidden from scrutiny by the Applicants, Hawaiian Telcom must presume that the rates provided by Verizon Wireless to Oceanic create a sufficient incentive for Oceanic not to develop its own wireless services with the spectrum it has but instead to use Verizon Wireless’ services as part of Oceanic’s own offerings.

Thus, the transaction may be viewed as an allocation of markets. Oceanic will stay out of the wireless market and earn profits by selling Verizon’s wireless service, while Verizon Wireless will be earning profits selling Oceanic’s broadband and video services, thus reducing Verizon Wireless’ incentive to compete vigorously in those markets. Moreover, in those territories in which Verizon is the incumbent LEC, Verizon has at the same time ended its FiOS build out plans and terminated its agreement to resell satellite television, thus further reducing competition in broadband and video markets.⁴¹

⁴⁰ <http://www.verizonwireless.com/b2c/explore/?page=why-verizon§ion=verizon-4g-lte#verizon-4g-lte> (last accessed Feb. 16, 2012).

⁴¹ Kevin Fitchard, *Verizon Cutting wireline, DirecTV ties as it shacks up with cable*, *gigaom.com* (Dec. 8, 2011), available at <http://gigaom.com/broadband/verizon-cutting-wireline-directv-ties-as-it-shacks-up-with-cable/>

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Furthermore, the product development joint venture may foreclose Hawaiian Telcom's ability to compete with the products likely to be created by the venture. Such products would specifically disadvantage Hawaiian Telcom, as its two largest rivals could coordinate to develop a product that, in all likelihood, would be incompatible with Hawaiian Telcom's network or subject Hawaiian Telcom to onerous provisions. For example, the joint research and development agreement could generate a product that requires the use of the large amount of spectrum that Verizon Wireless will have in Hawaii post-transaction. Without access to that level of spectrum, even if Hawaiian Telcom could obtain products jointly developed by the Applicants, Hawaiian Telcom could not utilize such a product. The practical impact of this is that the large service providers will continue to grow in size and market power and that the competitors with fewer underlying spectrum resources in Hawaii will have a diminished ability to compete. The resulting market will be one in which the small service providers are unable to provide sufficient competitive pressure on the larger players, and therefore, the large providers' price and output will not be constrained. Additionally, without sufficient competitive pressures in the market, the Applicants will be able to enhance their ability to act in a coordinated manner, all to the detriment of consumers.

The Joint Development Agreement also requires that [Highly Confidential]

[Redacted text block]

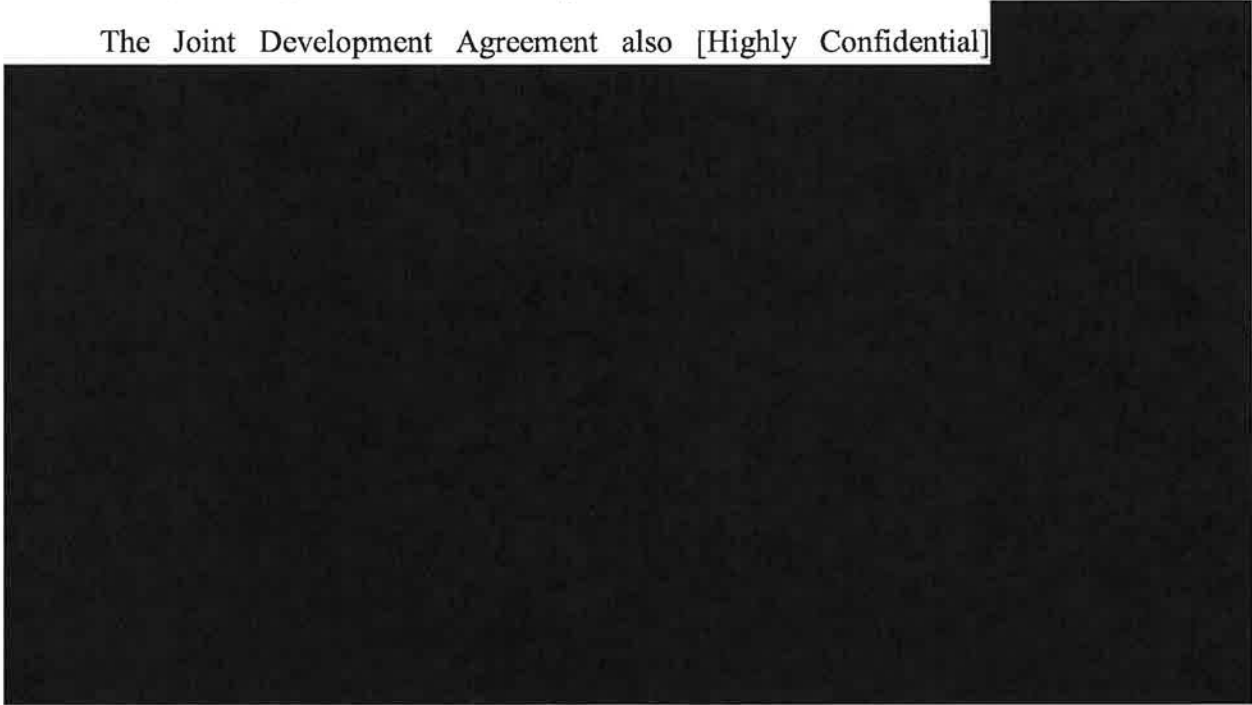
[Highly Confidential] The Joint Development Agreement could allow for market allocation or another form of anticompetitive conduct; Hawaiian Telcom just does not know. Hawaiian Telcom must

⁴² [Highly Confidential] [Redacted text] [Highly Confidential]

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therefore object to the Joint Development Agreement on the grounds that it may permit unlawful actions to take place, and it is fair for the Commission to infer, given the redactions, that the Joint Development Agreement does in fact provide for market allocation.

The Joint Development Agreement also [Highly Confidential]



[Highly Confidential]

The agreements between the Applicants may also facilitate explicit or tacit collusion between Verizon Wireless and Oceanic through the exchange or disclosure of competitively sensitive information as part of Verizon Wireless' agency relationship or the Joint Development Agreement. For example, while the Joint Development Agreement [Highly Confidential]



[Highly Confidential] At

a minimum, Verizon Wireless, as an agent for Oceanic, would presumably receive pricing and

⁴³ [Highly Confidential] [Highly Confidential]

⁴⁴ [Highly Confidential] [Highly Confidential]

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promotional information about Oceanic's high-speed Internet access and video services in advance of its public disclosure. Such an exchange of information would afford Verizon Wireless an opportunity to act in an anticompetitive manner that could harm the competitive landscape for high-speed Internet access and video services as Verizon Wireless and Oceanic could coordinate their offerings in a manner to the detriment of competition and customers.

With respect to the provision of video content, Oceanic's programming assets (e.g., University of Hawaii sports channel) could be deployed in unique and exclusive wireless deals with Verizon Wireless unavailable to Hawaiian Telcom. Verizon has also recently announced a joint venture with Redbox to provide a subscription-based streaming video service. Additionally, access to live sports and other video programming may not be obtainable from other wireless carriers and would place Hawaiian Telcom in a disadvantaged position when compared to its competitors. As noted above, wireless 4G LTE services are competing more and more with traditional video content delivery providers and that Verizon Wireless is clearly providing such services in Hawaii in competition to Hawaiian Telcom. Given the growing convergence of video programming delivery services and high-speed Internet access, the competitive impact of the Joint Agreements will not impact those services independently and any negative consequences resulting from coordinated conduct will affect Hawaiian Telcom directly as a competitor in the voice, high-speed Internet and paid video programming markets. Accordingly, Hawaiian Telcom contends that such Joint Agreements, coupled with the transfer of wireless spectrum to Verizon Wireless, are not in the public interest.

V. REQUESTED RELIEF

Pursuant to Commission's authority to review, deny, and condition license assignments, Hawaiian Telcom requests that to address the public interest concerns raised by the Applicants' transaction and other related agreements, especially in light of the uniquely dominant position of Oceanic and an Oceanic/Verizon Wireless combination in Hawaii, the Commission deny the assignment of SpectrumCo wireless licenses to Verizon Wireless in their entirety. In the

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alternative, Hawaiian Telcom requests that the Commission deny the assignment of SpectrumCo's wireless licenses in Hawaii and condition the approval of the assignment of SpectrumCo wireless licenses elsewhere on the amendment of the Joint Development and Joint Marketing agreements to exclude Hawaii. As a third, and less desirable alternative, Hawaiian Telcom requests that the Commission condition the transfer of the wireless licenses from SpectrumCo to Verizon Wireless in Hawaii on the modification of the Verizon Wireless and Oceanic joint marketing agreements such that Hawaii is the last location where those agreements would be implemented.

Respectfully submitted,

/s/

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